

FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463

SECRETARIAT

2004 DEC -6 P 2.14

FIRST GENERAL COUNSEL'S REPORT**SENSITIVE**

MUR: 5411

COMPLAINT FILED: February 13, 2004

RESPONSE RECEIVED: March 31, 2004

DATE ACTIVATED: October 14, 2004

EXPIRATION OF SOL: October 13, 2008

SOURCE:

COMPLAINT GENERATED

COMPLAINANT:

Zupancic for Congress 2004, Inc.

RESPONDENTS

Oregon State Senator Jackie Winters;
 Jackie Winters for Congress 2004, Inc.;
 Warren J. Thompson, treasurer;
 Friends of Jackie Winters;
 Warren J. Thompson, treasurer.

RELEVANT STATUTES:

2 U.S.C. § 441i(e)(1)
 2 U.S.C. § 441i(e)(2)
 2 U.S.C. § 441i(f)(2)
 2 U.S.C. § 441d
 11 C.F.R. § 300.61
 11 C.F.R. § 100.3(a)
 11 C.F.R. § 104.1(b)
 11 C.F.R. § 300.63
 11 C.F.R. § 100.11

INTERNAL REPORTS CHECKED:

Disclosure Reports

FEDERAL AGENCIES CHECKED:

None

I INTRODUCTION

This matter arises from a complaint filed against Oregon State Senator Jackie Winters, Jackie Winters for Congress 2004, Inc. ("the Federal committee"), Friends of Jackie Winters ("the State committee"), and Warren J. Thompson, as treasurer for both committees (collectively

1 "Respondents") by her primary opponent in Oregon's Fifth Congressional District, Zupancic for
2 Congress 2004, Inc. ("Complainant"). The complaint alleges that a publication the State
3 committee paid for with nonfederal funds was actually Federal election activity undertaken for
4 the benefit of the Federal committee. Compl at 2 Complainant also alleges in a supplement to
5 the initial complaint that the Federal committee sent out a mailing and e-mail that did not contain
6 the required disclaimers. Supp. at 2.

7 The available information indicates there is no reason to believe that Respondents
8 violated the prohibition against the use of nonfederal funds in 2 U.S.C. § 4411(e)(1) by virtue of
9 qualifying for the State candidate exemption in 2 U.S.C. § 4411(e)(2). Furthermore, the available
10 information indicates there is no reason to believe that Respondents violated 2 U.S.C. § 441d for
11 failing to include the required disclaimer on the e-mail referred to by Complainant. However, the
12 available information indicates that there is reason to believe Respondents violated 2 U.S.C. §
13 441d by failing to include a disclaimer in a letter to which the Complaint refers, but the
14 circumstances suggest that the Commission take no further action other than sending a letter of
15 admonishment.

16 II. FACTUAL AND LEGAL ANALYSIS

17 A. Factual Background

18 Jackie Winters was elected to the Oregon House of Representatives in 1998 and to the
19 Oregon State Senate in 2002. First as a State representative, then as a State senator, Winters
20 published an End of Session Report for distribution to her constituents in 1999, 2001, and 2003.¹
21 It is the 2003 Report that is the primary subject of this complaint.

¹ The Oregon Legislature only meets every other year

1 The 2003 Report was paid for with nonfederal funds by Winters' State campaign
2 committee, Friends of Jackie Winters. The Report was distributed as an ad insert in the Sunday,
3 October 12, 2003 edition of the Salem Statesman Journal. According to the paper's website, the
4 Sunday edition has a circulation of 63,511 in Marion and Polk counties.² Winters' senate district
5 appears to be located primarily, if not entirely, in Marion and Polk counties.³ It is not clear
6 whether the State senate district encompasses all of those two counties or whether there are parts
7 of the counties that are in other districts. As discussed below, Winters became a candidate for
8 the U.S House of Representatives from Oregon's 5th Congressional District in October of 2003.
9 That Congressional district extends to three other counties in addition to Marion and Polk
10 counties. Complainant alleges the geographic scope of distribution of Winters' Report extended
11 far beyond her senate district (Compl. at 3); however, there is no way to confirm that based on
12 the district and county maps publicly available. It appears likely that the distribution of the
13 Report was contained primarily in Winters' senate district, and any distribution outside the
14 district was probably incidental to the decision to distribute the Report through the newspaper.

15 Winters filed a statement of candidacy for Oregon's 5th Congressional District with the
16 Oregon secretary of state on October 1, 2003. On that same day she issued a press release stating
17 that she was running for Congress "because [she] want[ed] to help the President succeed in
18 improving education, creating jobs and protecting our quality of life." Compl. Exh. A. She filed
19 her Form 2 Statement of Candidacy with the Commission on October 13, 2003. Her response to
20 the complaint, however, alleges that she did not actually become a candidate until October 16,

² <http://news.statesmanjournal.com/services/faq/index.cfm#circ>.

³ www.sos.state.or.us/elections/DistrictMaps/SenateMaps/s10.pdf

2003 when she crossed the \$5,000 registration and reporting threshold by taking in contributions of \$5,000.⁴ Resp. at 2.

The 2003 Report was distributed to the public on October 12, 2003 and was paid for by Friends of Jackie Winters, her State committee, on October 15, 2003. The Report is a public communication and clearly identifies Jackie Winters. It does not refer to her Congressional campaign or her status as a Federal candidate. The report does contain some language similar to the language in her press release announcing her run for Congress. The report contains a "Focus on education" section extolling her commitment to Oregon's public schools, a "Getting Oregon back to work" section extolling accomplishments of the legislature in that area, and a "Caring for those in need of our help" section extolling her accomplishments in providing access to affordable health care to Oregonians.⁵

Complainant, therefore, alleges that Respondents violated Federal election law by paying for the Report with nonfederal funds. The response states that Winters was not a Federal candidate at the time the Report was distributed and paid for; that even if she was a Federal candidate, her State committee had sufficient permissible funds to pay for the Report⁶; and even

⁴ Winters had received contributions to her Federal campaign totaling \$4,000 on October 7, 2003.

⁵ The "dear friends" letter accompanying the report contained the following statements.

- 1) "When I ran my campaign to represent you in the State Senate I promised to have as my guide three basic principles: 1 Increase education funding to help our kids compete more effectively, 2. Protect our most vulnerable citizens by continued access to affordable health care, and 3 Provide the necessary resources to ensure public safety "
- 2) "With the poverty rate for children under 18 the highest it has been since 1994, I simply could not shut the door on these Oregonians. It goes against everything I believe in as a fellow Oregonian."
- 3) "But you didn't send me to the Senate to duck tough decisions You sent me there to tackle the difficult issues and to preserve our quality of life here in Oregon "

Compl Exh D.

⁶ Oregon allows unlimited contributions from individuals, as well as corporate and labor union contributions. Although the availability of sufficient funds from permissible sources could be a mitigating factor, it would not negate a violation if the disbursement from the nonfederal account was in connection with a Federal election.

1 if she was a Federal candidate and spent soft money to publish the Report, she was permitted to
2 do so because of her ongoing status as an Oregon State candidate and because the Report referred
3 to no other candidate. Resp. at 1-2.

4 B. Nonfederal Funds

5 Complainant alleges that Respondents violated 2 U.S.C. § 4411(e)(1) by using nonfederal
6 funds to pay for the 2003 Report. Compl. at 2. To determine whether Respondents violated the
7 law by spending nonfederal funds on Federal election activity several questions must first be
8 answered. First, even if Winters did not report having raised \$5,000 in Federal funds until
9 October 16, 2003, there is a question as to whether Winters may have been a Federal candidate at
10 the time the State committee disbursed funds for the 2003 Report on October 15, 2003.

11 However, it is not necessary to decide whether Winters was actually a Federal candidate at the
12 time the Report was distributed. Assuming arguendo that Winters was a Federal candidate, she
13 would still qualify for the State candidate exemption in 2 U.S.C. § 4411(e)(2).

14 If the Federal candidate prohibited from spending nonfederal funds under 2 U.S.C. §
15 4411(e)(1) is also a candidate for State office, the candidate may spend nonfederal funds "solely
16 in connection with such election for State or local office" as long as the expenditure only refers
17 to the State candidate or some other State or local candidate. 2 U.S.C. § 4411(e)(2); 11 C.F.R. §
18 300.63. Winters was and is a candidate for State office in Oregon.⁷ The Report referred only to

⁷ Under Oregon law, a candidate includes:

An individual who has solicited or received and accepted a contribution, made an expenditure, or given consent to an individual, organization, political party or political committee to solicit or receive and accept a contribution or make an expenditure on the individual's behalf to secure nomination or election to any public office at any time, whether or not the office for which the individual will seek nomination or election is known when the solicitation is made, the contribution is received and retained or the expenditure is made, and whether or not the name of the individual is printed on a ballot.

1 Winters as a State officeholder and candidate and to no other Federal candidate. Thus, it is not
2 necessary to determine whether the Report qualifies as Federal election activity if the Report was
3 "solely in connection with" Winters' State campaign.

4 The existence of the State candidate exemption indicates that there is some conduct,
5 which if engaged in by a State candidate who also happens to be a Federal candidate, is not
6 intended to be regulated by the FECA (as amended). For this exemption to have any meaning,
7 conduct that is merely generally supportive of an individual as a State candidate or officeholder
8 and would have been undertaken without the Federal candidacy cannot automatically be
9 considered to also be in connection with the individual's Federal election.

10 There are several factors that indicate the Report was issued solely in connection with
11 Winters' State campaign, but no single factor is dispositive. The conclusion that this conduct
12 falls within the State candidate exemption set forth in 2 U.S.C. § 4411(e)(2) is based on the
13 totality of the circumstances presented in this matter. The following facts suggest this conduct
14 was solely in connection with her State campaign.

15 First, Winters' State committee issued End of Session Reports similar in design and
16 substance after every legislative session in which Winters had taken part as a State officeholder.
17 Although the information as to the timing of when the previous End of Session Reports were
18 distributed is not available, the early October time period for distribution of the Report in
19 question seems reasonable based on the fact that the 2003 legislative session did not adjourn until
20 August 27th.

1 Second, as previously stated, the Report does not refer to Winters' Federal candidacy in
2 any manner nor does it solicit contributions for either her Federal or State campaign. The Report
3 refers to no other candidate, Federal or State. The content of the Report focuses on actual
4 legislation and accomplishments of the Oregon legislature in the 2003 session. While the Report
5 is generally complimentary to Winters and could be said to promote or support her as a State
6 senator, it does not support or promote her Federal candidacy except in the sense that any
7 mention of her name or any public communication stating she is a good person or a good State
8 officeholder could arguably be supportive of her Federal candidacy. If such were the case, the
9 State candidate exemption would be rendered meaningless.

10 Finally, the Report was distributed and paid for approximately seven months before the
11 primary election for the Congressional seat was held on May 18, 2004. Therefore, although the
12 Report was distributed within close proximity to Winters becoming a Federal candidate and is
13 generally supportive of Winters, it was not in close proximity to the primary election. Indeed it
14 appears to have been issued in the ordinary course of Winters' duties as a State officeholder, and
15 as a potential candidate for re-election to State office in 2006. The Report appears to have been
16 issued solely in connection with Winters' State campaign.

17 Accordingly, this Office recommends that the Commission find no reason to believe
18 Oregon State Senator Jackie Winters; Jackie Winters for Congress 2004, Inc. and Warren J.
19 Thompson as treasurer; Friends of Jackie Winters and Warren J. Thompson as treasurer, violated
20 2 U.S.C. § 441i(e)(1).

1 C. Disclaimer in Letter

2 In a supplement to the initial complaint, Complainant alleges that Winters' Federal
3 committee distributed an e-mail and a letter (as part of a mass mailing) that did not contain the
4 disclaimers required under 2 U.S.C. § 441d. *See also*, 11 C.F.R. § 110.11. Winters submitted a
5 copy of the e-mail and the mailing with her response. The e-mail does contain the required
6 disclaimer at the bottom of the e-mail text. Resp. to Supp. Compl. Exh. A. Therefore, this
7 Office recommends that the Commission find no reason to believe that Oregon State Senator
8 Jackie Winters; Jackie Winters for Congress 2004, Inc. and Warren J. Thompson as treasurer;
9 Friends of Jackie Winters and Warren J. Thompson as treasurer, violated 2 U.S.C. § 441d and 11
10 C.F.R. § 110.11 with regard to the e-mail.

11 On the other hand, the letter does not contain a disclaimer. It does reference a "return
12 envelope" that can be used to make a contribution to Winters' campaign. The response contains
13 a copy of the letter and what appears to be a contribution card-type document that could be the
14 "return envelope" referenced in the letter. Resp. to Supp. Compl. Exh. B. The contribution card-
15 type document does contain the required disclaimer. *Id.* It is possible the copy of the
16 contribution card-type document is the referenced "return envelope;" however, due to the fact the
17 copy is on a single sheet of paper and not the envelope itself, it is impossible to tell if it is the
18 referenced envelope. There is also no way to know, based on publicly available information, if
19 the contribution card-type document included with the letter in the response was actually
20 distributed with the letter.

21 Furthermore, under the regulations, "a communication that would require a disclaimer if
22 distributed separately, that is included in a package of materials, must contain the required

1 disclaimer." 11 C.F.R. § 110.11(c)(2)(v). The letter in question is a public communication that
2 expressly advocates the election of a clearly identified candidate, and solicits a contribution.
3 Although the letter appears to have been distributed with the contribution card containing a
4 disclaimer, it is a document that could be distributed separately. It would, therefore, require a
5 disclaimer. 11 C.F.R. § 110.11(a)(1)-(3), (c)(2)(v). If the letter was distributed in the same
6 envelope with the contribution card-type document (or envelope), then there was a disclaimer in
7 the mailing even though not actually on the letter. This suggests that the Commission take no
8 further action other than to issue a letter of admonishment.

9 Accordingly, this Office recommends the Commission find reason to believe Oregon
10 State Senator Jackie Winters, Jackie Winters for Congress 2004, Inc. and Warren J. Thompson as
11 treasurer violated 2 U.S.C. § 441d with respect to the letter but take no further action on this
12 matter other than to send a letter of admonishment.

13 **III. RECOMMENDATIONS**

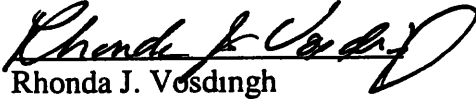
- 14 1. Find no reason to believe that Oregon State Senator Jackie Winters violated 2
15 U.S.C. § 441(e)(1) or 2 U.S.C. § 441d and 11 C.F.R. § 110.11(c)(2)(v) regarding
16 the e-mail.
17
- 18 2. Find no reason to believe that Jackie Winters for Congress 2004, Inc., Friends of
19 Jackie Winters, or Warren J. Thompson as treasurer for both committees violated
20 2 U.S.C. § 441(e)(1) or 2 U.S.C. § 441d and 11 C.F.R. § 110.11(c)(2)(v)
21 regarding the e-mail.
22
- 23 3. Find reason to believe that Oregon State Senator Jackie Winters violated 2 U.S.C.
24 § 441d and 11 C.F.R. § 110.11(c)(2)(v) with respect to the letter at issue but take
25 no further action other than to send a letter of admonishment.
26
- 27 4. Find reason to believe that Jackie Winters for Congress 2004, Inc. and Warren J.
28 Thompson as treasurer violated 2 U.S.C. § 441d and 11 C.F.R. § 110.11(c)(2)(v)
29 with respect to the letter at issue but take no further action other than to send a
30 letter of admonishment.
31

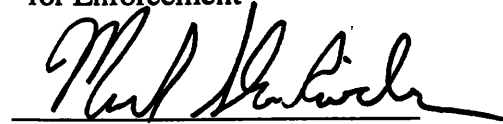
5. Approve the appropriate letters.
6. Close the file.

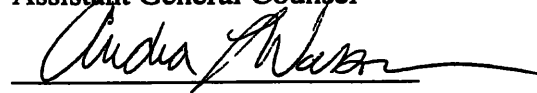
Lawrence H. Norton
General Counsel

12/3/04
Date

BY:


Rhonda J. Vosdingh
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for Enforcement


Mark Shonkwiler
Assistant General Counsel


Audra L. Wassom
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